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No. 588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

IN THE MATTER OF THE APPLICATION

of

PAUL SPIELVOGEL,

Petitioner-Appellant,

for an Order

vs.

ARTHUR C. FORD, Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York, et al.,

Respondents-Appellees.

On Appeal From the Supreme Court of the State of New York, New York County, and the Court of Appeals of the State of New York

PETITION FOR REHEARING

HERMAN J. ZAWIN,
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I. STANLEY STEIN,
Of Counsel.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellant, pursuant to Rule 58(1) of this Court, petitions for a rehearing of the order entered on January 14, 1957, dismissing the appeal in this case "for want of a substantial federal question."

1. Appellee's motion to dismiss relied on *Day-Brite Lighting Co.* v. *Missouri*, 342 U. S. 421, where this Court upheld a statute much less vulnerable to attack than the one here challenged. It seems therefore particularly ap-

propriate to note here a comment by the *Harvard Law Review* on the *Day-Brite* decision—a comment which is even more relevant to the unwarranted summary disposition of the present appeal:

> "The fear of acting as a 'superlegislature' should not deter the Court from exercising its judicial function, which presumably exists even in the area of economic legislation. When the Court relies on the *West Coast* and *Nebbia* cases to support the State's power to experiment, it should not overlook the fact that these cases also held that due process still requires that a law 'not be unreasonable, arbitrary and capricious and that the means selected * * * have a real and substantial relation to the objects to be obtained.' While the * * * statute might still meet those requirements, it is sufficiently different from past legislative experiments brought before the Court to demand more than summary treatment." 66 *Harv. L. Rev.* 131-132 (1952).

2. Appellant desires to emphasize that this case is here on appeal, not certiorari. It is the first case of its kind brought up for review to this Court.

While this Court may undoubtedly dismiss as insubstantial appeals on wholly frivolous claims, it has not summarily dismissed appeals when the questions raised affect the right to work. In *Barsky* v. *Board of Regents*, 347 U. S. 442, 472, Mr. Justice Douglas called the right to work "the most precious liberty that man possesses."

Professor Walter Gellhorn of the Columbia School of Law, who is known far beyond his profession for his studies in the field of liberty stated in his recent book, "Individual Freedom and Governmental Restraints" in the chapter headed as "The Right to Make A Living" (p. 151):

"* * * As matters stand, the citizen's right to use his faculties in a freely chosen career has been squeezed beyond justification. * * *"

3. The infringements of appellant's right under the 14th Amendment raises an important substantial federal question extending beyond the impact on the appellant alone.

On December 27, 1956, the New York Law Journal, acknowledged as the foremost daily legal publication in the United States, published the decision of the Court below as a matter of *front-page* importance.

On December 31, 1956, Yale University Law School, in a letter to the attorney of Record in this appeal wrote: "We think the above case, in which you were counsel, is one of legal significance, and have thus selected it for argument in the Yale Moot Court of Appeals during the 1957 Spring Term."

In the record itself there is abundant proof that the Court below could not have decided this case, if it were there on any ground other than the infringement of appellant's liberty. For that reason the Court of Appeals certified that solely a constitutional question was involved.

4. To dismiss this appeal without an opportunity for argument—without, even a citation to a prior decision—is to assimilate the appeal jurisdiction of this Court to that of *certiorari*, contrary to the carefully expressed intent of Congress in 28 U.S.C. 1257.

In 28 U.S.C. 1257 at page 203, it is set forth that:

"Where it clearly and unmistakably appears from the opinion of the State Supreme Court that the federal question was assumed to be in issue and was decided against the claim of federal right, and that

the decision of the question was essential to the judgment rendered, this is enough to give the federal Supreme Court authority to examine that question on a writ of error. Montana v. Rice, Mont. 1907, 27 S. Ct. 281, 204 U. S. 291, 51 L. Ed. 490. See also, Chambers v. Baltimore, etc., R. Co., Ohio 1907, 28 S. Ct. 34, 207 U. S. 142, 52 L. Ed. 143."

It appears from the jurisdictional statement of appellant that in the case now before this Court it affirmatively appears from the record that the federal question was presented to the New York Court of Appeals and that its decision of the federal question was necessary to its determination of the cause.

5. Appellant further desires to urge that the present appeal involves more than mere regulation of the economy. The bearing of this statute on liberty and minority rights is manifest; and the restrictive scope of review of legislative acts now applied in typical "economic due process" cases is inappropriate here.

Unlike the usual objector to economic regulation, appellant does not represent a large economic interest fearing merely a diminution of substantial wealth. Rather, deprivation of his license undercuts his basic right of liberty, to follow a calling for which he has duly qualified, and uprightly performed for a period extending over two decades. To this appellant, a disabled war veteran, loss of his license is perhaps a more serious obstacle to fulfilling his individual capacities than any restriction on his right to vote or speak. This challenged statute transcends the area of regulation—it aims to strap the citizen's ambition, even though the record shows it has no clear relation to the public interest. In this setting, the liberty which he is striving to protect should be valued at least as highly as the more usual personal and civil liberties—minority rights claims—to which this Court is justifiably sensitive

in due process cases. Moreover, the dangers inherent in the scheme of restriction challenged provide added reason for careful scrutiny by this Court rather than uncritical reliance on easy labels of "mere economic regulation."

CONCLUSION

For the foregoing reasons, appellant respectfully urges that this petition for rehearing be granted, that probable jurisdiction be noted, and that this case be set down for full argument on the merits.

Respectfully submitted,

HERMAN J. ZAWIN,
Attorney for Appellant,
18 Avenue B,
New York, N. Y.

I. STANLEY STEIN,
Of Counsel.

February 5, 1957

CERTIFICATE OF COUNSEL

WE HEREBY CERTIFY that the foregoing petition for rehearing is submitted in good faith and not for delay.

HERMAN J. ZAWIN

I. STANLEY STEIN